UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:	)
VITAMINS ANTITRUST LITIGATION	)
	)
THIS DOCUMENT RELATES TO:	)
	) **Misc. No. 99-197 (TFH)**
NBTY, Inc., Perrigo Co., Natural Alternatives Internatl., Inc., Leiner Health Products, Inc., et al. v. F. Hoffman-La Roche, Ltd., et al.	) **MDL No. 1285**
	)
and	)
	)
Publix Supermarkets, Inc. v. F. Hoffman-La Roche Ltd., et al.	)

MEMORANDUM OPINION Re: FDUTPA claims

Pending before the Court are defendants Degussa-Huls Corporation ("Degussa"), Lonza Inc., Lonza AG, and Reilly Industries' Motions to Dismiss Rexall Sundown, Inc.'s ("Rexall") claims under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") found in Count V of the Consolidated Second Amended Complaint in NBTY, Inc., et al. v. F. Hoffman-La Roche, Ltd., et al. Also pending before this Court is Publix Supermarkets, Inc.'s ("Publix") Motion to Reconsider the May 9, 2000 Ruling with Respect to FDUPTA.[1] Upon careful consideration of the parties' briefs on these issues and the entire record herein, the Court will grant Degussa, Lonza Inc., Lonza AG, and Reilly Industries' Motions to Dismiss Rexall's FDUTPA claims accruing prior to July 29, 1995 and will deny Publix's Motion to Reconsider the May 9, 2000 ruling with respect to FDUTPA.

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[1] The NBTY plaintiffs have filed a joinder to this Motion; therefore, the Court's ruling on this issue will bind the NBTY plaintiffs as well as Publix.

I. BACKGROUND

The original NBTY/Rexall complaint was filed in the United States District Court for the Eastern District of New York on July 29, 1999. In addition to federal antitrust claims under the Sherman Act, Rexall asserted indirect purchaser claims under the FDUTPA. Degussa was not named as a defendant in Rexall's FDUTPA claims. After transfer to this Court, plaintiffs filed an "Amended Consolidated Complaint" consolidating the NBTY/Rexall complaint with several other complaints also pending before this Court. Rexall's pendent FDUTPA claims were included in the Consolidated Amended Complaint, but Degussa was not named as a defendant to those claims.

On January 18, 2000, Degussa moved to dismiss the counts of the NBTY/Rexall Consolidated Complaint for failure to state a claim upon which relief may be granted. On or about the same date, Degussa, Ducoa L.P. and DCV, Inc. filed separate motions to dismiss the pendent FDUTPA claims of plaintiff Publix. Degussa argued that Florida law does not recognize the doctrine of fraudulent concealment to toll statutes of limitations, while DCV and DuCoa argued that sophisticated consumers and transactions involved in this litigation did not qualify as "consumer transactions" necessary to invoke FDUTPA prior to its June 30, 1993 amendment and therefore that Publix lacked standing to pursue FDUTPA claims prior to the date of this amendment.

On May 9, 2000, the Court issued a Memorandum Opinion and Order that, among other things, granted the DCV/DuCoa joint motion to dismiss Publix's FDUTPA claims accruing prior to June 30, 1993. The Court did not address Degussa's argument about the general viability of the fraudulent concealment doctrine under Florida law.

On May 30, 2000, the NBTY/Rexall plaintiffs moved for leave to file another amendment to their Amended Consolidated Complaint. This amendment, which was granted by the Court in June of this year, added Degussa and others to Rexall's FDUTPA claims. The issues presented by Rexall's FDUTPA claims are the same as those presented by Publix's FDUTPA claims. Degussa has since moved to dismiss Rexall's FDUTPA claims on the same grounds as Degussa, DuCoa and DCV previously moved to dismiss Publix's FDUTPA claims. Lonza Inc., Lonza AG and Reilly Industries, who were also added to Rexall's FDUTPA claims in the latest amendment, have filed Motions to Dismiss Rexall's FDUTPA claims joining Degussa's Motion and directly incorporating its arguments.

On June 13, 2000, Publix moved to reconsider the FDUTPA portion of the Court's May 9, 2000 Opinion. The NBTY plaintiffs filed a joinder to this Motion on June 27, 2000.

II. DISCUSSION

A. Motions to Dismiss Rexall's FDUTPA claims

Defendants Degussa, Lonza Inc., Lonza AG, and Reilly Industries argue that (1) Rexall lacks standing to pursue indirect purchaser claims under the FDUTPA accruing prior to June 30, 1993 and (2) fraudulent concealment is unavailable under Florida law to toll the statute of limitations on Rexall's FDUTPA claims accruing prior to July 29, 1995.

1. FDUTPA Claims Accruing Prior to June 30, 1993

As discussed in the Court's May 9, 2000 Memorandum Opinion, prior to the June 30, 1993 Amendments, FDUTPA applied only to "consumer transactions." See United Pacific Ins. Co. v. Berryhill, 620 So.2d 1077, 1079 (Fla. Dist. Ct. App. 5th Dist. 1993). A "consumer transaction" was defined in the FDUTPA as "a sale, lease, assignment, award by chance, or other

disposition of an item of goods, a consumer service, or an intangible to an individual for purposes that are primarily personal, family or household. See Fla. Stat. § 501.203(1) (1987). Rexall argues that although eight Florida intermediate appellate courts and six federal courts limited the FDUTPA to "consumer transactions," this Court should hold otherwise because the definition of "consumer" in the FDUTPA is broad enough to encompass "businesses and corporations." See Rexall Opp. at 3-6.

This Court agrees with plaintiff that prior to the 1993 amendments, corporations could recover damages arising from transactions that related to a "business opportunity . . . in which [the corporation] has not previously engaged." See Fla. Stat. § 501.203(1) (1991) (defining "consumer transaction"). However, defendants are clearly correct that the key distinction is not between businesses and individuals but between sophisticated and unsophisticated customers. Rexall has not cited a single case holding that the FDUTPA applied to sophisticated consumers prior to the 1993 amendments. In fact, every court to consider this issue has held that the FTUDPA did not apply to transactions by sophisticated consumers like Rexall until the statute was amended effective June 30, 1993. See, e.g., Bryant Heating and Air Conditioning Corp., Inc., 597 F. Supp. 1045, 1054 (S.D. Fla. 1984) ("this Court admits that it is as 'mystified' as the defendants as to why the plaintiff bases his argument on the changed definition of consumer when defendants' point is that the plaintiff cannot satisfy the other, equally crucial definition of 'consumer transaction'"); Packaging Corp. Int'l v. Travenol Labs, Inc., 566 F. Supp. 1480, 1482 (S.D. Fla. 1983) (amendment of the FDUTPA in 1979 to define "consumer" did not alter the requirement that FDUTPA claims arise from a "consumer transaction").

In order for Rexall's status as a "consumer" to be relevant, this Court must reject the

numerous state and federal court opinions interpreting the FDUTPA to preclude damage claims that are not based on a "consumer transaction." See, e.g., Kingswharf Ltd. v. Kranz, 545 So.2d 276, 277-78 (Fla. Dist. Ct. App. 3d Dist. 1989) (finding that the legislature intended the FDUTPA to apply only to "consumer transactions" and holding that, because real estate sales are not "consumer transactions" as defined by the FDUTPA, plaintiff lacked standing to bring a damages action under the FDUTPA); Packaging Corp. Int'l, 566 F. Supp. at 1483 ("[T]he statute appears to be directed to entities that have been traditionally thought of as consumers, in situations traditionally thought of as consumer transactions"); see also Golden Needles Knitting and Glove Co., Inc. v. Dynamic Mktg. Enterprises, Inc., 766 F. Supp. 421, 430 (W.D. N.C. 1991) (citing Black v. Dep't of Legal Affairs, 353 So.2d 655, 656 (Fla. Ct. App. 1977)) ("As a matter of law, the Court believes that the statute is limited to 'consumer transactions,' and not to sophisticated commercial transactions such as in the matter presently before the Court. The statute is not intended to protect parties such as Defendant that have substantial previous experience in such transanctions"). When applying state law, this Court must "generally treat decisions by the state's intermediate appellate courts as authoritative unless there is a compelling reason to doubt that those courts have got the law right." Home Valu, Inc. v. Pep Boys, 213 F.3d 960, 963 (7th Cir. 2000). In this case, Rexall has provided the Court no compelling reason to doubt that Florida's intermediate appellate courts "have got the law right."

The stated purposes of the FDUTPA prior to its 1993 amendment clearly indicate that the statute was intended to apply only to "consumer transactions." See Fla. Stat. § 501.201(2) (1991) ("Florida unfair and deceptive trade practices statute is limited to consumer transactions and does not apply to sophisticated commercial transactions between manufacturer and distributer"). In

fact, the statute explicitly states that damage claims under the FDUTPA must arise from "the property that is the subject of the consumer transaction." See Fla. Stat. § 501.212(3); see also Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc., 693 So.2d 602, 605 (Fla. Dist. Ct. App. 2d Dist. 1997) ("the legislature conferred on 'a consumer who has suffered a loss as a result of a violation' of the FDUTPA the right to bring an 'individual action' to 'recover actual damages, plus attorney's fees and court costs.' § 501.211(2). It limited such damages, however, to 'the property that is the subject of the consumer transaction' and specifically excluded claims for personal injury or death or damage to other property. § 501.212(3)"); Rollins v. Heller, 454 So.2d 580, 584 (Fla. Dist. Ct. App. 3d Dist. 1984) ("The Act, however, only allows recovery of damages related to the property which was the subject of the consumer transaction"); Bryant Heating and Air Conditioning Corp., 597 F. Supp. at 1053-54 (holding that "a private right of action for damages under the [FDUTPA] cannot be maintained unless the alleged unfair or deceptive acts or practices complained of involves a 'consumer transaction'" and finding that, because the plaintiff was a sophisticated and experienced business, the transactions underlying its claim did not qualify as "consumer transactions"). The Court finds that the language and purposes of the FDUTPA make clear that the FDUTPA was limited to "consumer transactions" until it was amended effective June 30, 1993. Therefore, Rexall's claims for damages under the FDUTPA for injuries allegedly suffered prior to June 30, 1993, when the statute was amended to remove the definition of "consumer transaction," must be dismissed.

2. Availability of Fraudulent Concealment Doctrine under Florida law

Florida's tolling statute, enacted in 1974, enumerates eight specific grounds for tolling statutes of limitations under Florida law. See Fla. Stat. § 95.051(1)(1999). The statute is

exclusive: "No disability or other reason shall toll the running of any statute of limitations [under Florida law] except those specified . . ." in § 95.051. Fla. Stat. § 95.051(2) (1999). As defendants point out, the doctrine of fraudulent concealment is not included among the eight enumerated grounds. Accordingly, defendants contend that Rexall may not rely on the doctrine of fraudulent concealment to claim damages accruing outside the four-year limitations period applicable to FDUTPA claims. See, e.g., Webb v. Chambly, 584 So.2d 216, 217 (Fla. Dist. Ct. App. 4th Dist. 1991) ("We also find insurmountable the language in section 95.051, Florida Statutes, which limits tolling of statutes of limitations to the circumstances set out within, none of which include those present here").

Plaintiff concedes that § 95.051 does not include the doctrine of fraudulent concealment but argues that the Florida Supreme Court has implicitly overruled this statute in Nardone v. Reynolds, 333 So.2d 25 (Fla. 1976). Without discussing or even mentioning § 95.051, the Florida Supreme Court in Nardone held that "fraudulent concealment by [the] defendant so as to prevent plaintiffs from discovering their cause of action . . . will toll the statute of limitations until the facts of such fraudulent concealment can be discovered through reasonable diligence." Nardone, 333 So.2d at 37. Defendants surmise that this decision may reflect the fact that Nardone was filed in 1971, before § 95.051 limited the grounds for tolling statutes of limitations, and therefore that the Court was bound to construe Florida statute of limitations law, including tolling based on fraudulent concealment, as it existed in 1971. See id. at 32.

Since Nardone, the Florida Supreme Court has only revisited the viability of the common law doctrine of fraudulent concealment in one case, Fulton County Adm'r v. Sullivan, No. 87110, 1997 WL 589312 (Fla. Sept. 25, 1997) (holding that § 95.051 superseded Nardone and

preempted application of the common law doctrine of fraudulent concealment), the opinion for which was later withdrawn because the Florida Supreme Court determined that the Georgia statute of limitations applied to that case instead of the Florida statute of limitations. See Fulton County Adm'r v. Sullivan, 753 So.2d 549, 552 (Fla. 1999) ("Sullivan II") (holding that Georgia statute of limitations applies and thus doctrine of fraudulent concealment would be available to toll Georgia statute of limitations). The Court acknowledges that the withdrawn Sullivan opinion is not binding on this Court, but even the superseding opinion does appear to indicate that the Florida Supreme Court was drawing a crucial distinction between the Florida statute of limitations, which could not be tolled for fraudulent concealment, and the Georgia statute of limitations, which expressly provided for tolling in cases of fraudulent concealment. See Sullivan II, 753 So.2d at 552-53 ("In Florida, a cause of action for wrongful death accrues on the date of death . . . and has a two-year statute of limitations period. . . .The Florida statute of limitations, accordingly, began to run in this case on January 16, 1987, the date of Ms. Sullivan's death. In Georgia, a cause of action for wrongful death accrues at death and has a two-year limitations period. . . . However, a Georgia statute expressly tolls the statute of limitations for fraudulent concealment . . . . Thus, the jury's finding of fraudulent concealment in this case tolls Georgia's two-year statute of limitations for filing a wrongful death action so that the period of limitations actually began to run from the time of petitioner's discovery of the fraud in 1990"). While the Court recognizes that in Sullivan II the Florida Supreme Court was not directly asked to resolve the issue of whether fraudulent concealment is applicable under Florida law after the passage of § 95.051 and therefore any discussion of Florida law in that opinion is dicta, the Court finds the language quite suggestive of a distinction between Florida and Georgia law, which

would imply that had Florida law been found to apply, the first opinion would not have been withdrawn and the fraudulent concealment doctrine would have been held inapplicable.

Although Nardone has not been explicitly overruled and no Florida Supreme Court decision since then has directly ruled upon this issue, the Court finds that Florida statute of limitations law is clear and unambiguous and that there is insufficient evidence upon which to find that Nardone overruled § 95.051. Given the fact that the Florida Supreme Court in Nardone did not discuss § 95.051 anywhere in its opinion, let alone mention that it could be overruling this statute, and given the fact that § 95.051 would not have applied to the case before it at that time since, for purposes of that case, the Florida Supreme Court was required to construe Florida statute of limitations law as it existed in 1971, this Court cannot find that Nardone overturned § 95.051. Florida caselaw recognizing the doctrine of fraudulent concealment must yield to the clear and unambiguous statement of the Florida legislature. As the Florida Supreme Court has recently reiterated, "when construing statutes of limitations, courts generally will not write in exceptions when the legislature has not." Federal Ins. Co. v. Southwest Florida Retirement Ctr., Inc., 707 So.2d 1119, 1122 (Fla. 1998). Because fraudulent concealment is not included among the tolling provisions recognized in § 95.051 and because this Court has found that § 95.051 has not been overturned, Rexall's damages under their FDUTPA claims are limited to those accruing within the four-year limitations period, namely July 29, 1995. Accordingly, defendants' Motions to Dismiss Rexall's FDUTPA claims accruing prior to July 29, 1995 are granted.[2]

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[2] This ruling also applies to Publix, since Degussa made this same argument in its Motion to Dismiss Publix's FDUTPA claims.

B. Motion to Reconsider

Publix requests reconsideration of that portion of this Court's May 9, 2000 Memorandum Opinion and Order barring Publix from seeking damages under the FDUTPA for claims relating to purchases that occurred prior to June 30, 1993.

Although this Court does have the power to revisit decisions that it has already made, "as a rule, courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 817 (1988). In this case, the Court cannot find that its prior decision regarding Publix's FDUTPA claims was clearly erroneous.

Not only does Publix raise matters not previously argued or briefed which is generally improper in a motion for reconsideration, but Publix cites no controlling law or other authority warranting a reversal of the Court's prior ruling. In fact, Publix's motion rests entirely on a single law review article written in 1974. See Publix Motion at 2 (citing Tennyson, The Deceptive and Unfair Trade Practices Act: A New Approach to Trade Regulation in Florida, 2 F.S.U.L.R. 223 (1974)). Consequently, Publix fails to address, let alone substantively distinguish, the contrary on-point case law cited by defendants and relied upon by this Court in its May 9, 2000 Memorandum Opinion.

Between the date of FDUTPA's enactment in 1973 and the time of the 1993 amendments broadening the scope of its coverage, a body of case law developed clearly holding that sophisticated purchasers such as Publix could not maintain suit under the FDUTPA. See, e.g., United Pacific Ins. Co., 620 So.2d at 1080 (sales on the wholesale level were not within the definition of "consumer transactions" governed by FDUTPA); Golden Needles Knitting, 766 F.

Supp. at 430 ("as a matter of law, the Court believes that the [FDUTPA] is limited to 'consumer transactions,' and not to sophisticated commercial transactions such as in the matter presently before the Court. The statute is not intended to protect parties such as Defendant that have substantial previous experience in such transactions"); Heindel v. Southside Chrysler Plymouth, Inc., 476 So.2d 266, 268 (Fla. Dist. Ct. App. 1st Dist. 1985) (auto repair found not to be a "consumer transaction" when auto was primarily for business use and owner was involved in auto resale business).

The 1974 law review article relied upon by Publix could not and did not address this case law, since it was published so soon after the FDUTPA was enacted. Moreover, the Tennyson article provides no controlling law, or even any persuasive authority, for the proposition that Publix could maintain a suit under the FDUTPA as it was enacted in 1973. In fact, while the article does state that the FDUTPA was meant to act both as a consumer protection statute and a trade regulation statute, it explicitly acknowledges that the FDUTPA's reach in 1974 was limited to sales of "goods and services primarily for personal, family, or household use." Tennyson at 230. Without any legal support, Publix baldly asserts that the Florida legislature, "by clear oversight," forgot to draft the FDUTPA definition of "consumer transaction" to include wholesale transactions. Publix's only authority for this statement is a footnote in the Tennyson article, which merely states that the legislature failed to change the definitional section of the FDUTPA when the Act as a whole went through a round of changes. See Tennyson at 231 n.47. As defendant EM Industries points out in its opposition to Publix's Motion, the legislature's failure to make this alteration could just as easily be interpreted as a conscious decision not to effect that change in the law.

Publix also asserts that the 1993 amendments were clarifications of original legislative intent rather than a substantive change in the law. To support this proposition, Pubix cites two unrelated cases. The first, State Farm Mutual Automobile Ins. Co. v. Laforet, 658 So.2d 55, 56 (Fla. 1995), actually supports defendants' position. In State Farm, the Florida Supreme Court held that a newly created section of a statute that altered the damages provisions of that statute should not be given retroactive effect despite the fact that the Florida legislature specifically directed that the statute should be given retroactive effect because the new section constituted a substantive change in the law. The second, Kaplan v. Peterson, 674 So.2d 201 (Fla. Ct. App. 1996), is distinguishable on its facts. In Kaplan, the court found that an amendment to the Pollution Discharge Prevention and Control Act, which allowed a private cause of action against a polluter by a landowner where the statute had previously been silent on the issue of standing, was a clarification of the law because had the statute not originally been interpreted to allow such private suits, the amendment would have been superfluous. Kaplan, 674 So.2d at 205. Unlike the statute in Kaplan, the FDUTPA clearly did not allow suits relating to wholesale transactions until the 1993 amendments. See, e.g., United Pacific Ins. Co., 620 So.2d at 1077. In broadening the definition of "consumer transaction" under § 501.202(2), the Florida legislature clearly created new obligations and penalties for those entities engaged in such transactions and thus effected a substantive change in the law. Such substantive changes are not given retroactive effect in Florida. See State Farm, 658 So.2d at 61 (citing cases). Therefore, the 1993 amendments to the FDUTPA cannot be given retroactive effect and Publix's Motion for Reconsideration of the FDUTPA portion of the Court's May 9, 2000 Memorandum Opinion and Order is denied.

III. CONCLUSION

For the foregoing reasons, defendants Degussa, Lonza AG, Lonza Inc., and Reilly Industries' Motions to Dismiss Rexall's FDUTPA claims accruing prior to July 29, 1995 are granted. Furthermore, Publix's Motion for Reconsideration of the FDUTPA portion of the Court's May 9, 2000 Memorandum Opinion is denied. An order will accompany this Opinion.

October 26th, 2000

Thomas F. Hogan
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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ORDER Re: FDUTPA claims

In accordance with the accompanying Memorandum Opinion, it is hereby

ORDERED that Degussa-Huls Corporation, Lonza Inc., Lonza AG, and Reilly Industries' Motions to Dismiss Rexall Sundown Inc.'s claims under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") accruing prior to July 29, 1995 are **GRANTED**. It is further hereby

ORDERED that Publix Supermarkets, Inc.'s Motion to Reconsider the Court's May 9, 2000 Ruling with Respect to FDUTPA is **DENIED**.

October 26, 2000

Thomas F. Hogan
United States District Judge